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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DONALD KENT et al., Plaintiffs and Appellants, v. WARREN PUMPS, LLC, Defendant and Respondent.	B243832 (Los Angeles County Super. Ct. No. BC473418)

APPEAL from a judgment of the Superior Court of Los Angeles County, Emilie H. Elias, Judge. Reversed.

Simon Greenstone Panatier Bartlett and Brian P. Barrow for Plaintiffs and Appellants.

Gordon & Rees, Michael Pietrykowski, Don Willenberg; Carroll, Burdick & McDonough, Laurie J. Hepler and Gonzalo C. Martinez for Defendant and Respondent.

Donald Kent (Kent) and his wife Lisa Kent appeal a summary judgment in favor of Warren Pumps, LLC (Warren), in a personal injury action involving exposure to asbestos. Plaintiffs contend Warren failed to satisfy its initial burden as the party moving for summary judgment to show that they could not establish that Kent was exposed to asbestos in products manufactured or supplied by Warren. Plaintiffs also contend the evidence creates a triable issue of fact on this issue in any event. We conclude that Warren failed to satisfy its initial burden as the party moving for summary judgment and therefore will reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Kent worked as a maintenance machinist at the Naval Air Rework Facility (NARF) at North Island in the San Diego Bay from 1961 to 1987, with the exception of a four-year period from 1966 to 1970 when he served in the United States Air Force. NARF was responsible for maintaining and repairing United States Navy ships and aircraft. Warren manufactured and supplied pumps, including some pumps with asbestos in some components.

Kent's work at NARF included maintaining and repairing pumps by removing and replacing gaskets and packing, some of which allegedly contained asbestos. He eventually developed malignant mesothelioma.

2. *Trial Court Proceedings*

Kent and Lisa Kent filed a complaint against Warren and numerous other defendants in November 2011 alleging that Kent's occupational exposure to asbestos

caused him to develop mesothelioma. They allege that the defendants or their predecessors in interest manufactured or supplied products containing asbestos to which Kent was occupationally exposed. They allege counts against Warren for (1) negligence; (2) strict products liability based on failure to warn and design defect; and (3) loss of consortium.

Warren moved for summary judgment or summary adjudication in June 2012 arguing that Plaintiffs' factually devoid discovery responses and evidence presented by Warren showed that Plaintiffs could not establish the element of causation because they could not prove exposure to asbestos from any product manufactured or supplied by Warren. Warren presented Kent's deposition testimony and Plaintiffs' responses to special interrogatories and inspection demands in support of the motion.

Warren also presented a declaration by its manager of new pump sales to the United States Navy, Roland Doktor. He declared, "Not all of the pumps manufactured by Warren contained asbestos-containing gaskets and/or packing"; "A diligent review of Warren's records produced no records of sales of pumps to Naval Air Rework Facility in North Island, California"; and, "A diligent review of Warren's records produced no records of sales of replacement asbestos-containing gaskets or packing to Naval Air Rework Facility in North Island, California."

Warren also presented a declaration by James Delaney, a former commissioned officer in the navy with experience in the procurement of materials for use in the maintenance and repair of pumps and equipment on navy vessels. He declared, "The United States Navy's procedure for ordering replacement gaskets and packing was to

order in large quantities from the lowest cost supplier, among packing and gasket manufacturers who had been qualified by the Navy; not from equipment manufacturers. These consumable items are then placed into the Navy's supply system and are requisitioned from central supply activities by operating and support forces as necessary." He declared further, "In my experience, and at the times relevant to this case as set forth above, the United States Navy primarily purchased replacement gaskets and packing from outside suppliers, not original equipment manufacturers such as Warren Pumps, LLC."

Plaintiffs opposed the motion arguing that Kent in his deposition testimony had identified Warren as the manufacturer of (1) original, factory-installed gaskets and packing that he removed from Warren pumps; and (2) a replacement preformed gasket that he removed from a particular Warren pump. They cited Kent's deposition testimony that, in some cases, the word "asbestos" appeared on the gasket itself, on the box it came in, or in the technical manual. They also argued that Warren's discovery responses and Doktor's deposition testimony showed that Warren manufactured and supplied pumps with gaskets, packing and insulation made from asbestos, supplied spare gaskets and packing made from asbestos with its new pumps, and supplied replacement gaskets and packing made from asbestos.

Plaintiffs argued that their discovery responses did not show an absence of evidence of causation. Instead, they argued, their discovery responses considered together with Kent's deposition testimony and Warren's discovery responses could reasonably support a finding that Kent was exposed to asbestos from products supplied

by Warren. Plaintiffs also filed evidentiary objections to the Delaney and Doktor declarations and argued that those declarations failed to show that Plaintiffs could not establish the element of causation. Warren filed evidentiary objections to Kent's deposition testimony.

The trial court granted Warren's summary judgment motion. The order granting the motion stated that the Delaney and Doktor declarations and Plaintiffs' factually devoid discovery responses shifted to Plaintiffs the burden of establishing causation. It stated that Plaintiffs failed to create a triable issue of material fact that Kent was exposed to asbestos in a product supplied by Warren. The order did not expressly rule on the parties' evidentiary objections, but stated that Kent's deposition testimony was insufficient to create a triable issue of material fact. The court entered judgment in favor of Warren in August 2012. Plaintiffs timely appealed the judgment.

CONTENTIONS

Plaintiffs contend Warren failed to satisfy its initial burden on the summary judgment motion to show that they could not establish that Kent was exposed to asbestos in products manufactured or supplied by Warren. They also contend the evidence creates a triable issue of material fact on that issue in any event.

DISCUSSION

1. *Standard of Review*

A defendant moving for summary judgment must show that an element of the plaintiff's cause of action cannot be established or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) The defendant can satisfy its initial burden by

presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 (*Miller*).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller*, *supra*, 36 Cal.4th at p. 460.) We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.)

2. *Warren Failed to Satisfy its Initial Burden as the Party Moving for Summary Judgment*

A plaintiff in an asbestos case must prove that he or she was exposed to asbestos in a product manufactured or supplied by the defendant (cause-in-fact) and that there is a reasonable medical probability that such exposure was a substantial factor in causing the plaintiff's injury. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982-983; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084.) Warren's summary judgment motion focused on the cause-in-fact requirement.

A product manufacturer generally cannot be held liable in strict liability or tort for harm caused by a product that it did not manufacture or supply. (*O'Neil v. Crane*

Co. (2012) 53 Cal.4th 335, 362.) "The mere 'possibility' of exposure does not create a triable issue of fact. [Citation.] 'It is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment.' [Citation.]" (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108.)

Warren presented in support of its summary judgment motion the Doktor declaration stating that it had no record of any sales to NARF of either pumps or asbestos-containing gaskets or packing. Doktor declared that not all pumps manufactured by Warren contained asbestos in gaskets or packing. Warren also presented Plaintiffs' responses to special interrogatories. Warren argued that the responses were factually devoid because they provided no specific information identifying Warren as the manufacturer of any asbestos-containing gaskets or packing that he worked on. It cited Kent's deposition testimony stating that he generally had no way of knowing whether the gaskets and packing he removed from Warren pumps were original or replacement equipment and whether they were manufactured or supplied by Warren. Warren also presented the Delaney declaration on the Navy's procurement practices.

Plaintiffs' interrogatory responses cited Kent's deposition testimony that he performed maintenance work on many Warren pumps, including the removal and replacement of gaskets and packing. They cited his testimony that he had to scrape and wire brush the surface to remove the gaskets and that the packing "was usually dry and brittle and came out in pieces." They cited his testimony that he installed preformed

replacement gaskets on Warren pumps and that he knew that Warren was the manufacturer of the replacement gaskets because "We ordered the gaskets or we had our supply personnel order the gaskets from Warren after looking at the tech manual and what have you . . . . " The responses also cited Kent's testimony that there were instances where he installed a preformed replacement gasket on a Warren pump that he later removed, and that he knew this because he was responsible for maintenance in the area and the information was recorded in a maintenance logbook. The responses also cited his testimony that he removed the original packing from Warren pumps in the waterfall system area of the plant.

Thus, Plaintiffs' discovery responses presented in support of the summary judgment motion identified Warren as the manufacturer of preformed replacement gaskets that Kent installed and later removed and the manufacturer of pumps in the waterfall system area from which he removed the original packing. In our view, the absence of information specifically identifying those particular Warren products as containing asbestos does not render the discovery responses factually devoid or show that plaintiffs cannot establish cause-in-fact. Instead, the evidence of Kent's exposure to Warren products and his description of the "dry and brittle" material that he removed from the packing together with the undisputed fact that some of the gaskets and packing supplied by Warren contained asbestos creates a triable issue of fact as to cause-in-fact. Moreover, nothing in the Doktor and Delaney declarations negated the existence of a triable issue of fact. Those declarations go to the weight of the evidence and do not show that Plaintiffs cannot establish cause-in-fact.

Warren argues that Kent's deposition testimony is internally contradictory and therefore cannot create a triable issue of fact. Warren cites Kent's testimony that although the technical manuals that he consulted stated "Warren," he does not know who drafted the manuals. Warren has not shown that it is necessary to know the author of the manual in order to determine whether it identified products manufactured by Warren. Moreover, Kent's testimony that he had the supply staff order parts from Warren after consulting the manual tends to show that Warren supplied the parts, and therefore is evidence of that fact, and does not depend on the truth of any statement in the manual. For the same reason, we need not decide whether the statement in the manual identifying Warren as the manufacturer is hearsay. (See *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 681 [held that package labels and an instruction sheet were hearsay when offered to prove the contents of a package].)[1]

Warren argues that Kent has no personal knowledge that the orders for parts were actually fulfilled by Warren. We conclude that this goes to the weight of the evidence and does not preclude the trier of fact from reasonably concluding that parts ordered from Warren were supplied by Warren.

Accordingly, we conclude that Warren failed to satisfy its initial burden as the party moving for summary judgment and therefore is not entitled to summary judgment.

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[1] Similarly, we need not decide whether Kent's deposition testimony presented in opposition to the summary judgment motion contained inadmissible hearsay relating to the word "asbestos" on parts or packaging.

DISPOSITION

The judgment is reversed. Plaintiffs are entitled to recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.